

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suede G. Kelly.

Devon Power LLC

v.

Docket No. EL05-119-000

ISO New England, Inc.

ORDER ON COMPLAINT

(Issued July 22, 2005)

1. On May 24, 2005, Devon Power LLC (Devon) filed a complaint, pursuant to section 206 of the Federal Power Act (FPA),¹ naming ISO New England, Inc. (ISO-NE) as the respondent. In its complaint, Devon asserts that ISO-NE failed to properly compensate Devon for the services it provided to ISO-NE for a two-month period (from August 1, 2004 through September 30, 2004), pursuant to the parties' rights and obligations under their Commission-approved Reliability Must Run Agreement (RMR Agreement).² Devon seeks an order directing that ISO-NE compensate Devon in the amount of \$802,000, plus interest. For the reasons discussed below, we will grant Devon's complaint.

Background

2. Devon states that it is a Delaware limited liability company that owns power generation facilities in Connecticut, including, as relevant here, a quick-start unit located in Milford, Connecticut known as Devon Generating Unit 14 (Unit 14). Unit 14 is identified as a "Resource" under the RMR Agreement. Devon states that during the period of time relevant in this case, Unit 14 had a summer operating capacity of 31 MW.

¹ 16 U.S.C. § 824e (2000).

² The RMR Agreement was approved by the Commission in an order issued March 22, 2004. *See Devon Power LLC*, 106 FERC ¶ 61,264 (2004).

3. Devon states that under the RMR Agreement, Devon is paid a Monthly Fixed Cost Charge in exchange for providing reliability services to ISO-NE.³ The methodology for calculating the Monthly Fixed Cost Charge provides for monthly payments that total each year up to, but no more than, Devon's Annual Fixed Revenue Requirement.⁴ The RMR Agreement establishes the Monthly Fixed Cost Charge as the Monthly Availability Payment reduced (but not below zero) by any Monthly Non-Performance Penalty. The Monthly Availability Payment, in turn, is defined as the lesser of the Current Monthly Availability Payment or the remainder of the Annual Fixed Revenue Requirement for a Resource, less the total Monthly Availability Payments previously received during the current contract year.⁵

4. Devon states that relative to the issues raised by its complaint, the key formula in dispute, under the RMR Agreement, is set forth at Schedule 4, Equation B-3, which defines the Current Monthly Availability Payment as the sum for all hours in the month of the following:

$$\text{Hourly Availability Rate (\$/hr)} \times \frac{\text{Resource Availability Limit (MW)}}{\text{Max. Net Dependable Capacity (MW)}}$$

5. Devon notes that two of the three terms used in this equation (*i.e.*, the Hourly Availability Rate and the Resource Availability Limit) are not at issue here.⁶ Devon asserts that what is in dispute is the meaning and operation of the third term, the Maximum Net Dependable Capacity. Devon states that the RMR Agreement defines the Maximum Net Dependable Capacity as the Seasonal Claimed Capability for each Unit for the appropriate period "*as reported by [ISO-NE].*"⁷ The significance of this definition is discussed further below.

6. First, however, Devon explains that for the period November 2003 through May 5, 2004, Unit 14 was on an extended planned outage, during which period it was unable to schedule a capability test, the procedure pursuant to which Units 14's Seasonal Claimed

³ RMR Agreement at section 3.3.

⁴ *Id.* at section 4.

⁵ *Id.* at Schedule 4, Equation B-2.

⁶ The Hourly Availability Rate is defined under section 2 of Schedule 4 as the Annual Fixed Revenue Requirement divided by Target Available Hours, which are defined as the hours in a calendar year less the Outage Hours. The Resource Availability Limit is defined at section 2 as the actual hourly capability of each Unit.

⁷ RMR Agreement at Schedule 4, section 2C (emphasis added).

Capability could have been established. Devon states that, accordingly, ISO-NE notified Devon, April 20, 2004, that Unit 14's Seasonal Claimed Capability was being derated to zero for both the Winter and Summer Claimed Capability Periods, effective April 27, 2004.⁸ Devon states that on May 5, 2004, Unit 14 returned to service and commenced bidding in ISO-NE's Day Ahead and Real Time energy markets. Devon states that on June 9, 2004, it requested that ISO-NE perform a capacity test known as a CCA-Restore in order to restore Unit 14's prior capacity rating.⁹

7. Devon states that on June 23, 2004, ISO-NE notified Devon of the test results, concluding that Unit 14 demonstrated a 41.626 MW winter and a 31.056 MW summer Seasonal Claimed Capability, and also notified its staff of the test results, including its "NX-12 Administrator."¹⁰ Devon states that pursuant to the requirements of M-20, it would have been required to submit these test results to the NX-12 Administrator, in the form of an NX-12 Form, if the test results had shown an increase in the amount of capacity it had on file in connection with its Unit, while test results showing a decrease in available capacity are not required to be reported.¹¹ Devon states that it did not immediately file an NX-12 Form requesting restoration of Unit 14's Seasonal Claimed Capability ratings, but that an NX-12 Form was subsequently submitted on September 28, 2004 following Devon's discovery, on ISO-NE's web site, that Unit 14 had been given a Seasonal Claimed Capability of zero.

8. Devon states, however, that over the two-month period at issue here, it continued to provide reliability services to ISO-NE under the RMR Agreement by bidding Unit 14 into the Day Ahead and Real Time energy markets each day in the period beginning May 5th (the date Unit 14 was returned to service) through September 2004 and was dispatched by ISO-NE to provide energy for reliability purposes at least once each month

⁸ Devon states that pursuant to ISO-NE Manual 20, at Attachment D (M-20), generators such as Devon are required to establish their Seasonal Claimed Capability rating for both the Summer (June 1 through September 30) and Winter (October 1 through May 31) Capability Periods in order to be eligible to supply Unforced Capacity (UCAP) to ISO-NE's markets. A generator establishes its Seasonal Claimed Capability rating by requesting that ISO-NE conduct a Claimed Capability Audit. The Claimed Capability Audit, which is required to be performed annually, is used to establish, restore, or verify a Unit's Seasonal Claimed Capability rating.

⁹ See M-20 at section D3.2.

¹⁰ Devon states that the role of ISO-NE's NX-12 Administrator is to update the physical characteristics of a Unit, including its Seasonal Claimed Capability.

¹¹ See M-20 at section D3.3(4).

during this period. Devon asserts that since Unit 14 is a quick start unit, it provided Operating Reserves during the hours it was available even when not providing energy.

9. Devon states that in October and November 2004, respectively, ISO-NE notified Devon that the initial settlements for the months of August and September 2004 Current Monthly Availability Payments were \$0, based on a zero Seasonal Claimed Capability for Unit 14. Devon states that in response, it filed with ISO-NE, Requests for Billing Adjustments (RBA) protesting ISO-NE's failure to pay the Monthly Fixed Cost Charge for Unit 14. Devon states ISO-NE denied its request, based on its interpretation of the RMR Agreement at Equation B-3,¹² as it relates to the submission of NX-12 Forms.

10. Devon challenges ISO-NE's interpretation of the RMR Agreement. Devon asserts that the Seasonal Claimed Capability "as reported by [ISO-NE]" during the period in question was not zero, as claimed by ISO-NE, but rather the Seasonal Claimed Capability reported to Devon (and the NX-12 Administrator) by ISO-NE in the June 23, 2004 CCA-Restore test. Devon argues that when ISO-NE notified it of the results of the Unit 14 CCA-Restore test, it simultaneously notified the NX-12 Administrator of these results and that the NX-12 Form would not have provided any additional information not already in the possession of ISO-NE. Accordingly, Devon argues that it should not be penalized for failing to meet its ministerial duty of filing this form in a timely manner.

11. Devon also argues that because ISO-NE had provided the required Seasonal Claimed Capability results to the NX-12 Administrator, accepted Unit 14's bids, and utilized Unit 14 at times during that period made it reasonable for it to interpret the requirement that it file a NX-12 Form as a ministerial formality. Devon Power also points out that the monthly settlements for May through July 2004 were based on reported Seasonal Claimed Capability were sent to it in July, with no mention of the Seasonal Claimed Capability for May being assigned a value of zero. It argues that if, prior to October 2004, ISO-NE had informed it that the manner for compensating Unit 14 for the months of August and September would change, Devon could have taken corrective action. Devon requests that the Commission order ISO-NE to pay it \$802,000, plus interest.

Notice of Filing and Responsive Pleadings

12. Notice of Devon's complaint was published in the *Federal Register*,¹³ with the respondent's answer, interventions, comments, and protests due on or before June 15, 2005. ISO-NE submitted a timely-filed answer. In addition, motions to intervene were

¹² See P 4, *supra*.

¹³ 70 Fed. Reg. 32,603 (2005).

timely-filed by the NEPOOL Participants Committee and the Connecticut Municipal Electric Energy Cooperative. On June 16, 2005, The Mirant Americas Companies (Mirant) filed a motion to intervene out of time. In its answer, ISO-NE asserts that in denying payment to Devon for the two-month period at issue in this case, it adhered to the applicable provisions of its operating agreements, specifically including M-20¹⁴ and Operating Procedure No. 14 (OP-14).¹⁵ ISO-NE states that as the system operator for the New England markets, it is not authorized to ignore or loosely interpret these obligations. ISO-NE adds that the RMR Agreement clearly states that Devon will operate its units “in accordance with the NEPOOL Filed Documents and the NEPOOL System Rules.”¹⁶ ISO-NE states that via electronic correspondence, it notified Devon of the winter and summer Seasonal Claimed Capability rating and reminded Devon of its obligation to file an updated NX-12 Form.

13. ISO-NE also challenges Devon’s assertion that Schedule 4, section 2C of the RMR Agreement is controlling in this case. ISO-NE asserts that because the RMR Agreement also incorporates by reference ISO-NE’s operating agreements, it is M-20 and OP-14 that must be looked to in this case, not Schedule 4, Section 2C, as interpreted by Devon.

14. On June 23, 2005, Devon filed an answer to ISO-NE’s answer, in which it reiterates a number of the arguments set forth in its complaint.

Discussion

Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁷ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, we will grant the motion to intervene out of time submitted by Mirant, given its interests in the issues presented, the early stage of the

¹⁴ See n. 8, *supra*.

¹⁵ ISO-NE notes that under Appendix A of OP-14, it is the market participant’s responsibility to submit an NX-12 Form regarding any changes in generator data (such as Seasonal Claimed Capability), and that such changes will be effective no earlier than seven days from the date that ISO-NE determines the NX-12 Form to be complete and correct..

¹⁶ See RMR Agreement at Recital section B.

¹⁷ 18 C.F.R. § 385.214 (2005).

proceeding, and the fact that granting the intervention will not cause any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁸ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Devon's answer and will, therefore reject it.

Analysis

16. For the reasons discussed below, we will grant Devon's complaint. Devon concedes in its complaint that it failed to submit, in a timely fashion, an NX-12 Form, following Devon's receipt of the CCA-Restore test results on June 23, 2004. Devon also points out, however, that the information that would have been contained in this NX-12 Form was identical to the information already possessed by ISO-NE (and the NX-12 Administrator), in the form of the CCA-Restore test results themselves.¹⁹ Moreover, over the two-month period at issue here, Devon continued to provide reliability services to ISO-NE by bidding Unit 14 into ISO-NE's Day Ahead and Real Time energy markets; and indeed, Unit 14 was dispatched by ISO-NE during this period. Unit 14 also provided Operating Reserves to ISO-NE over this two-month period. As such, ISO-NE continued to benefit from the reliability services provided by Unit 14, as did the market as a whole.

17. ISO-NE, in its answer, cites to those provisions of its market rules that it relied upon in denying payment to Devon for the relevant period, i.e., M-20 and OP-14. These provisions, as ISO-NE asserts, do require Devon to submit an NX-12 Form under the circumstances at issue here and we expect market participants to abide by this requirement. The parties' rights and obligations in this case, however, were also defined by the RMR Agreement, including as relevant here, Schedule 4, section 2C.²⁰ Schedule 4, section 2C defines the Current Monthly Availability Payment in the form of an equation that includes, as one of its components, the term Maximum Net Dependable Capacity. Devon asserts, however, and we agree that this term is ambiguous. Specifically, in defining the term Maximum Net Dependable Capacity as the Seasonal Claimed Capability for each Unit for the appropriate period as reported by ISO-NE, the RMR Agreement fails to specify the manner in which the Seasonal Claimed Capability

¹⁸ *Id.* at § 385.213(a)(2).

¹⁹ *See* P 7, *supra*. Specifically, the CCA-Restore test issued by ISO-NE demonstrated a winter Seasonal Claimed Capability of 41.626 MW and a summer Seasonal Claimed Capability of 31.056 MW. This information would have permitted ISO-NE to calculate Devon's Current Monthly Availability Payment under Schedule 4, Equation B-3 of the RMR Agreement. These test results, moreover, were provided to the NX-12 Administrator on the same day Devon received the results.

²⁰ *See* P 4 and P 5, *supra*.

may be established in a given case. In particular, the RMR Agreement does not provide further guidance where, as here, Unit 14's capacity was made available to ISO-NE and the parties (and the market as a whole) benefited and were not otherwise disadvantaged by Devon's error.

18. We agree with Devon that under these circumstances, ISO-NE's strict reliance on its operating manuals and procedures (M-20 and OP-14) and its determination not to consider the underlying meaning and intent of the RMR Agreement cannot be justified.²¹ In fact, under Schedule 4, Equation B-3 of the RMR Agreement, the term "Maximum Net Dependable Capacity" is defined as the Seasonal Claimed Capability for each Unit for the appropriate period "as reported" by ISO-NE. While the reporting requirement contemplated by this definition is not defined in the RMR Agreement, we agree with Devon that in this case, this requirement was sufficiently satisfied on June 23, 2004, when ISO-NE "reported" the results of the CCA-Restore test on Unit 14. In fact, this interpretation is consistent with the parties' intent to compensate Devon in return for the reliability services it provided to ISO-NE.

19. While the submission of the NX-12 Form is a required element in the process ISO-NE oversees, ISO-NE may wish to evaluate the usefulness of the NX-12 Form since the substantive value provided by this form, as in this case, appears to be conveyed to the NX-12 Administrator through internal communications.

20. The purpose of the RMR Agreement is to ensure that Unit 14 and the other Resources identified in that agreement are available to ISO-NE for reliability purposes. Similar to *Wisvest*, Devon fulfilled its obligations, in this regard, over the two-month period at issue. Despite Devon's failure to file the NX-12 Form, there is no evidence in this case that its actions were calculated to manipulate or take advantage of market rules, or that its failure to submit the NX-12 Form was anything other than inadvertent. The circumstances in this case, then, lead us to conclude that Devon's failure to submit the NX-12 Form should be excused, and that market participants will not be disadvantaged as a result. Therefore, we will direct ISO-NE to compensate Devon in the amount it requests (\$802,000),²² for the services provided by Unit 14, utilizing Unit 14's Seasonal Claimed Capability, as determined by the CCA-Restore Test.

²¹ See *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 101 FERC ¶ 62,547 (2002) (*Wisvest*).

²² This compensation should not include amounts that exceed the total amount of compensation that Devon is permitted by the RMR Agreements for 2004.

21. Finally, Devon requests interest pursuant to Rule 35.19(a)²³ on the payment amount directed above. We will grant Devon's request, given our underlying ruling regarding Devon's entitlement to compensation.

The Commission orders:

(A) Devon's complaint is hereby granted, as discussed in the body of this order.

(B) ISO-NE is hereby ordered to compensate Devon for the availability of Unit 14 during the disputed period, as discussed in the body of this order, in the amount of \$802,000. ISO-NE is further directed to pay interest on this amount pursuant to 18 C.F.R. § 35.19a.

(C) Within 60 days of the date of this order ISO-NE is hereby directed to file with the Commission a report of the payments made to Devon pursuant to this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

²³ 18 C.F.R. § 35.19 (2005).